FORM OF INDICTMENTS UNDER STATUTES DIVIDING MURDER INTO DEGREES.—The distinction between murder and manslaughter in our law rests upon an English statute enacted in 1531.[1] By this statute, benefit of clergy was denied in all cases of felonious homicide committed "willfully and of malice prepensed."[2] By statute in the United States, murder has in turn been divided into degrees,[3] most of the statutes declaring that murder shall be in the first degree when committed with willful, deliberate and premeditated malice aforethought; or in the perpetration of, or the attempt to perpetrate, any of certain named felonies; and that all other murder shall be in the second degree, and subject to a less severe punishment.[4] The great majority of American courts[5] hold that an indictment in the old common law form, for a willful killing with malice aforethought, is sufficient to sustain a conviction of murder in the first degree.[6] In a number of these states, it is provided by the same statute which creates the degrees, that "nothing herein shall be construed to make necessary any alteration of the common law form of indictment."[7] But it is undeniable that the courts ought not give effect to these statutes if to do so would be to violate the fundamental principle of criminal procedure, carried into the constitutions of the nation and of most of the states, that an indictment must allege every element of the offense with which the accused is charged, so that he may be informed of the nature and cause of the accusation, and the punishment to which he is liable.[8] It is urged that the statutes in question do not create a new offense, but merely fix degrees of punishment, leaving the crime of murder what it was at common law.[9] This implies that the words "willful, deliberate and premeditated" of the statutes add nothing to the "malice afore-

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[1]23 Hen. VIII, c. 1, § 3.

[2]There were no grades of felonious homicide at common law. See Britton (Nichols' Transl.) B. 1, p. 29; 3 Bishop, New Criminal Procedure (2nd ed.) § 498 *et seq.* The term murder was originally applied to a very limited class of killings, which afterward disappeared from the law. See Britton, *supra,* p. 32. After the enactment of the statute of 23 Hen. VIII, the old word was applied to the higher grade of felonious homicide, committed "willfully and of malice prepensed". 3 Co. Inst., **47, 50.

[3]Wharton, Homicide (3rd ed.) § 106; 2 Bishop, New Criminal Law (8th ed.) § 723 *et seq.*

[4]2 Bishop, New Criminal Law (8th ed.) §§ 727, 728.

[5]In England murder is not divided into degrees. Wharton, Homicide (3rd ed.) § 107.

[6]Green *v.* Commonwealth (1886) 94 Mass. 155; People *v.* Conroy (1884) 97 N. Y. 62; Sharpe *v.* State (1885) 17 Tex. App. 486; Cluverius *v.* Commonwealth (1886) 81 Va. 787, 848; State *v.* Thompson (1877) 12 Nev. 140; State *v.* Covington (1895) 117 N. C. 834, 865, 23 S. E. 337; People *v.* Ung Ting Bow (1904) 142 Cal. 341, 75 Pac. 899.

[7]See Green *v.* Commonwealth, *supra*; State *v.* Covington, *supra*; *cf.* Andrews *v.* People (1905) 33 Colo. 193, 79 Pac. 1031.

[8]See U. S. Const., Amend. VI; Cannon *v.* State (1895) 60 Ark. 564, 31 S. W. 150; State *v.* McCormack (1869) 27 Iowa 402; Fouts *v.* State (1857) 8 Oh. St. 98, 109; Sharpe *v.* State, *supra,* dissenting opinion of Hurt, J., at p. 500.

[9]See Green *v.* Commonwealth, *supra*; Sharpe *v.* State, *supra*; State *v.* Thompson, *supra.*

thought" of the common law,[10] and, followed to its logical conclusion results either in the anomaly of having a statutory second degree which means nothing at all,[11] or in violating the well established principle that, where a crime consists of several elements, an indictment charging one or more of the component parts of the crime will not support a conviction of the crime itself.[12] Finally it is argued that "malice aforethought" includes the malice of both the first and second degrees, and thus charges either the first degree or the second. To hold, however, that an indictment for murder can charge either degree without using the words which show the distinction is to establish for this crime a rule different from that laid down for other crimes which are divided into degrees.[13] The attitude of the common law toward this problem may be noted from the fact that, after the enactment of Stat. 23 Hen. VIII distinguished between murder and manslaughter, an indictment for murder was required to charge the crime expressly in the words of the statute, or else the accused could not be convicted of the higher offense.[14]

The "malice aforethought" of the common law included both express malice, and malice implied in law from evidence that the killing was committed in an attempt to perpetrate another crime.[15] In view of the foregoing it is not surprising to find courts holding, under modern statutes which describe first degree murder as a killing with deliberate and premeditated malice, or a killing perpetrated in the commission of another felony, that proof of the attempted felony is conclusive proof of the malice charged in the indictment.[16] The incongruity of this result is strikingly illustrated by the recent case of *Sloan* v. *State* (Fla. 1915) 69 So. 871. The indictment here copied the words of the statute in charging "homicide with a premeditated design to effect the death of the deceased," but the court (although reversing the decision on another point) sustained a charge that "if the defendant at the time of the killing was engaged in an attempt to perpetrate a robbery upon the deceased, he was guilty of murder in the first degree." The holding is supported by the weight of authority, which, arguing from the assumption that the "deliberate and premeditated malice" of the statute and the "malice aforethought" of the common law are identical, declares that the rule as to the implication of malice

[10]Malice at common law was "any evil design in general, * * * *un disposition a faire un male chose.*" 4 Bl. Comm., *199.

[11]If "deliberately premeditated malice aforethought" and "malice aforethought" are equivalent, and are the distinguishing marks of the first degree, what is murder in the second degree, which the statute says is "all other murder of malice aforethought"? Note that any willful killing without malice aforethought is manslaughter. 3 Bishop, New Criminal Procedure (2nd ed.) § 574.

[12]Thus, a felonious homicide may include an assault, a battery, a manslaughter, and a murder, but an indictment for assault and battery or for manslaughter, will not support a conviction of the murder. *Ibid.*

[13]See People *v.* Gassbeck (N. Y. 1871) 9 Abb. Pr. (N. S.) 328; Lacy *v.* State (1862) 15 Wis. 15; *cf.* U. S. *v.* Fisher (C. C. 1849) 5 McLean 23.

[14]2 Hawkins' Pleas of the Crown, c. 33, § 25; 2 Hale's Pleas of the Crown, pp. 336, 344.

[15]3 Co. Inst., **47, 50; 4 Bl. Comm., *199; Wharton, Homicide (3rd ed.) § 574.

[16]State *v.* Covington, *supra*; Roach *v.* State (1880) 8 Tex. App. 478.

remains the same as at common law.[17] But there are some jurisdictions which have held, in better reasoned if less widely followed decisions, that the classification of the crime according to its being committed in the course of another felony or with deliberate and premeditated malice indicates that the malice in the two classes is of a different degree, and that proof of the one kind will not satisfy an allegation of the other,[18] although it is admissible as evidence from which the other may be implied.[19]

INTERPRETATION OF THE WORD DEBT.—Despite the early origin of the action of debt,[1] and the large number of cases dealing with the subject, the meaning of the word is by no means settled.[2] Blackstone defined debt as "a sum of money due by certain and express agreement; where the quantity is fixed and specific, and does not depend on any subsequent valuation to settle it".[3] That the limitations of the action of debt have strongly affected the subsequent interpretations of the word seems to admit of little doubt. Debt would not lie except for a fixed and definite sum, or one easily ascertainable,[4] and this same limitation of certainty was formerly deemed a characteristic of the debt itself. Again, the action of debt was the proper one when the obligation arose from a judgment, and it is now almost universally held that a judgment is a debt. There seems to have been no hesitation about reaching this conclusion when the judgment arises *ex contractu*,[5] but some courts have refused to adopt this result where the judgment arises *ex delicto*.[6] The better view, however, was taken in the recent case of *Bronson* v. *Syverson* (Wash. 1915) 152 Pac. 1039, where it was held that a statute authorizing the arrest of a defendant in certain cases of tort was unconstitutional, as authorizing an imprisonment for debt, since a judgment resulting from a tort action was a debt

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[17]People *v.* Giblin (1889) 115 N. Y. 196, 21 N. E. 1062; State *v.* McGinnis (1900) 158 Mo. 105, 59 S. W. 83; Commonwealth *v.* Flanigan (Pa. 1844) 7 Watts & S. 415; Andrews *v.* People, *supra*. In Oklahoma, where the statute does not divide murder into degrees, but only classifies the kinds of murder, the court comes to the same conclusion by arguing that the statute merely describes the evidence by which murder may be proved. Holmes *v.* State (1911) 6 Okla. Cr. 541, 119 Pac. 430.

[18]Rayburn *v.* State (1901) 69 Ark. 177, 63 S. W. 356.

[19]Powell *v.* State (1905) 74 Ark. 355, 85 S. W. 781; State *v.* Weems (1895) 96 Iowa 426, 447, 65 N. W. 387.

[1]For the history of the action of debt, see Holmes, The Common Law, 251 *et seq.*; 2 Pollock and Maitland, History of English Law (2nd ed.) 203 *et seq.*

[2]Elliot, C. J., in The City of Valparaiso *v.* Gardner (1884) 97 Ind. 1, 6, says: "In view of the warring among the adjudged cases, it is not easy to affirm that the word 'debt' has a firmly settled meaning."

[3]3 Bl. Comm., *154. See also Bouvier's Law Dict.

[4]Perry, Common Law Pleading, 52.

[5]3 Bl. Comm., *160.

[6]Moore *v.* Green (1875) 73 N. C. 394; People *v.* Cotton (1853) 14 Ill. 414; but *cf.* People *v.* Greer (1867) 43 Ill. 213.